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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL, PETITIONERS

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS, THE UNITED STATES, THE ATTORNEY GENERAL AND MEMBERS OF ARBITRATION BOARD NO. 282, IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 5a-25a) is reported at 225 F. Supp. 11. The opinions of the court of appeals (Pet. App. 1a-4a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1964. The petition for a writ of certiorari was filed on March 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In Public Law 88-108, Congress created a special arbitration board to make a binding determination, for a two-year period, of two major issues in the work-rules dispute between the railroads and the labor organizations representing their operating employees, and it also provided a specified procedure for judicial review of that determination. The following questions are presented:

1. Whether the courts below properly refused to convene a three-judge district court under 28 U.S.C. 2282 to consider the constitutional attacks on the Board's decision, on the grounds (a) that the suit challenging the Board's decision was not one to enjoin the enforcement of a statute, but to set aside the Board's Award and (b) that, in any event, the constitutional challenge was insubstantial.

2. Whether Public Law 88-108 provided sufficiently definite standards for the guidance of the Board in making its determination.

3. Whether, in reaching its decision, the Board followed the procedures and standards specified in Public Law 88-108.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in appendices D, E, F, and G to the petition (Pet. App. 26a-35a).

STATEMENT

This litigation arises out of a controversy between the nation's major railroads and the labor organizations representing their operating employees, over (1) the need for firemen on freight and yard locomotives and (2) the composition of train crews. During the past four and a half years the dispute has been the subject of extensive study, mediation by the Secretary of Labor and the National Mediation Board, recommendations by two impartial presidential boards, and a prior decision by this Court. When all other methods of avoiding a nationwide strike had been exhausted, Congress enacted, in August, 1963, Public Law 88-108,[1] which was intended to provide for a binding resolution of the two major aspects of the controversy for a two year period. The basic facts are undisputed.

1. *Background and Undisputed Facts.*[2] On November 2, 1959, the railroads (the "carriers") served the five interested labor unions (the "labor organiza-

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[1] 77 Stat. 132, approved August 28, 1963; Pet. App. 26a-30a.

[2] This summary is based upon the opinion of the neutral members of the Board (J.A. 35-46), S. Rep. No. 459, 88th Cong., 1st Sess., and the Court's opinion in *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284.

tions") with notices of proposed changes in work rules, including changes in the use of firemen on locomotives not using steam power (the "fireman (helper)" issue) and in the composition of the train crew (the "crew consist" issue).[3] The labor organizations made counterproposals on September 7, 1960. Pursuant to agreement of the parties, the controversies were submitted to a Presidential Railroad Commission composed of fifteen members, five members each representing the labor organizations, the carriers and the public. After thirteen months of hearings and two months of deliberation, the Commission recommended various modifications in the work rules. The railroads accepted the Commission's recommendations but the labor organizations rejected most of them. Further bargaining between the parties and mediation by the National Mediation Board did not produce agreement.

After three unsuccessful periods of negotiations, the carriers announced their intention to put their proposed work rule changes into effect. The labor organizations brought suit to enjoin the changes. On review this Court held that, having exhausted all of the statutory procedures, the parties were relegated

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[3] The fireman is actually the engineer's helper, and is frequently referred to as a "helper", particularly in yard service. The train crew consists of the operating employees other than the engineer and fireman, and is usually composed of a conductor (foreman) and trainmen (in road service) or brakemen and helpers (in yard service). The notices were served pursuant to Sec. 6 of the Railway Labor Act (44 Stat. 582, as amended 45 U.S.C. 156).

to self-help; and that the carriers had a right to make the rule changes, subject only to the creation of an Emergency Board pursuant to Section 10 of the Railway Labor Act. *Brotherhood of Locomotive Engineers* v. *Baltimore & O. R. Co.*, 372 U.S. 284. Under threat of an immediate nationwide strike, the President established Emergency Board No. 154, which issued its report on May 13, 1963, as a basis for bargaining. The railroads offered to accept the recommendations, but the labor organizations stated only that they were "a useful tool" for negotiation.

On July 9, 1963, the President proposed that the parties submit all issues to Mr. Justice Goldberg for final determination. Again the carriers agreed, but the labor organizations did not. After directing an investigation by a subcommittee of his Advisory Committee on Labor Management Policy and receiving its reports, the President, on July 22, 1963, requested emergency legislation to avoid a nationwide rail strike and the resulting injury to the Nation's commerce, health, defense and security. While the congressional committees were holding extensive hearings on the proposed legislation, the Secretary of Labor, at their request, made further efforts to mediate the dispute.

On August 2, 1963, the Secretary submitted to the parties suggestions which were intended to identify the areas which, in his judgment, afforded the largest possibility of agreement on the two major issues (J.A. 140-148, 230-235).[1] Negotiations, conducted primarily through the Secretary, went forward on

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[1] "J.A." refers to the Joint Appendix in the court of appeals.

this basis, but broke down on August 12. On August 15, the Secretary proposed voluntary submission of the fireman (helper)" and the "crew consist" issues to binding arbitration. On August 16, the carriers accepted this proposal and the labor organizations accepted it "with certain reservations," but they were unable to agree upon the terms of a submission.

Congress then enacted Public Law 88-108 (77 Stat. 132, Pet. App. 26a-30a), by which it submitted the two major issues to a special arbitration board for binding determination for a two year period, and instructed the parties to exercise all efforts to resolve the remaining issues by agreement. The congressional decision to provide arbitration to prevent a nationwide railroad strike was premised upon the belief that the statute "simply incorporated in legislation form what the parties had already basically agreed upon," albeit with some resevrations—that is, "arbitration of the two main issues involved" in the dispute.

The Arbitration Board was to consist of seven members: two carrier members and two labor organization members, who were in turn to select three neutral members. In case of disagreement, the neutral members were to be named by the President. The National Mediation Board was to compensate the neutral members and to provide the Arbitration Board with appropriate services and facilities.[6] The Arbi-

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[5] S. Rep. 159, 88th Cong., 1st Sess. p. 9; H. Rep. No. 713, 88th Cong., 1st Sess. p. 13; Clause 7, Pub. L. 88-108, Pet. App. 26a-27a.

[6] Sec. 2, Public L. 88-108, Pet. App. 27a-28a.

tration Board was to render its decision within ninety days, but the decision was not to be effective until sixty days thereafter.[7] All changes in working conditions, except by agreement, and all strikes and lockouts were prohibited for the one hundred and eighty day period during which Public Law 88-108 was to be in effect.[8]

The Arbitration Board was instructed to make an "award" on the portions of the carriers' notices of November 2, 1959, and the labor organizations' counter proposals of September 7, 1960, presenting the "fireman (helper)" issue and the "crew consist" issue (Section 3, Pet. App. 28a). The Board was to conduct its proceedings pursuant to Sections 7 and 8 of the Railway Labor Act (45 U.S.C. 157 and 158), and the Secretary of Labor was to furnish the Board with copies of his statement to the parties of August 2, 1963, and other papers "setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement" on remaining matters.[9] The Board was directed to incorporate in its award "any matters on which it finds the parties were in agreement"; to resolve the matters on which they were not in agreement; and to give due consideration to the matters on which the parties were in "tentative agreement," to "the narrowing of the areas of disagreement which has been accomplished in bar-

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[7] Sec. 5, Pub. L. 88-108, Pet. App. 29a.

[8] Secs. 1 and 8, Pet. App. 27a, 30a.

[9] Sec. 3, Pet. App. 28a.

gaining and mediation," to the interests of the carriers and employees, and to the effect of the Award "upon adequate and safe transportation service to the public."[10] The Board's Award was to constitute a complete, final and binding disposition of the issues, but was not to remain in effect for more than two years, unless the parties agree otherwise.[11] The Award was made subject to the review provisions of Section 9 of the Railway Labor Act (45 U.S.C. 159, Pet. App. 30a-32a) and the United States District Court for the District of Columbia was designated as the court in which the Award was to be filed.[12]

2. *Proceedings before the Arbitration Board.* The four members appointed by the parties having failed to agree, the President appointed the three neutral members to the Arbitration Board, which was designated as Arbitration Board No. 282. The Board held 29 days of hearings, beginning on September 24, 1963, at which it heard 40 witnesses; examined over 200 documentary exhibits; made inspection trips; and heard and considered the oral and written arguments of the labor organizations and the carriers (J.A. 47). In addition, the Board considered two memoranda dated September 23, 1963, submitted by the Secretary of Labor, which set forth his understanding of the extent of agreement, tentative agreement and disagreement on the two issues. Attached to the memoranda

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[10] Secs. 3 and 7(a), Pet. App. 28a and 29a.

[11] Secs. 3 and 4, Pet. App. 28a-29a.

[12] Sec. 4, Pet. App. 28a-29a.

were his suggestions of August 2, 1963, and related papers (J.A. 133-224, 225-271).

On November 26, 1963, the Board issued its Award (J.A. 8-29), accompanied by an opinion of the neutral members (J.A. 30-88), the concurring views of the carrier members (J.A. 89-91) and the dissents of the labor organization members (J.A. 92-132). Although finding a large area of tentative agreement between the parties on the job protection to be accorded individual firemen, the Board found [13] "hopeless disagreement on the crucial questions" regarding the elimination of firemen's jobs and "no substantial structure of agreement" upon which to base an Award on that issue (J.A. 61, 50-52). The Board therefore found it necessary to "start from scratch" to reach its own conclusion as to the need for firemen and to develop a practical system to determine which jobs, if any, should be eliminated (J.A. 52). The Board found that the functions performed by firemen on locomotives (primarily lookout and maintenance) in most instances could be performed adequately by other members of the engine or train crew, without imposing an undue burden upon them and without undue hazard to lives and property (J.A. 54-58).

On the fireman issue, the Board's Award provides a procedure which could eventually eliminate up to ninety per cent of the fireman positions, subject to

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[13] Although the Award itself contains no findings of fact, the opinion of the neutral members set forth the facts which were found and which formed the basis for the Award in which the carrier members concurred.

provisions for the protection of individual firemen. In brief, each carrier is permitted to draw up a list of freight and yard engine crews which, in its judgment (based on considerations of safety, work burden and adequate transportation), do not require the services of firemen. The local chairman of the labor organization representing the carrier's firemen may, on the basis of the same considerations, and after conferences between the interested parties, designate up to ten per cent of the listed crews on which the carrier must continue to use a fireman (J.A. 12-14). His designation is to be binding. The remaining positions listed by the carrier are to be eliminated, subject to the rights of presently employed firemen.

Regularly employed firemen with ten or more years of service are entitled, under the Award, to continue in such employment until it terminates through natural causes, *i.e.*, death, disability, discharge for cause, retirement, etc. Regularly employed firemen with from two to ten years of service are entitled to continue in such employment until it terminates through natural causes, or until they are offered a comparable job for which they are or can become qualified, with relocation expenses, seniority rights and specified guaranteed annual earnings. Irregularly employed firemen with more than two years of service, and all firemen with less than two years of service, may be separated with a specified severance allowance (J.A. 14-20). Firemen who have not performed fireman or engineer service within two years may be separated without severance pay.

On the "crew consist" issue, the Board found large areas of tentative agreement, and therefore confined itself in general to developing and refining such agreements, resolving the remaining disagreements and ironing out details (J.A. 52-53). The Award provides a procedure for determining at the local level the composition of the train crews, under specified standards and guidelines, with complete job protection for those presently employed. Either a carrier or a labor organization may make proposals for change in the composition of the crew in main line road service, except where the crew consists of one conductor and two trainmen, and in yard and branch line road service, regardless of the present composition of the crew. If the parties cannot reach agreement, either may refer the dispute to a special board of adjustment, consisting of a carrier member, a labor organization member and a neutral member, to be selected by the two other members or, if they cannot agree, by the National Mediation Board. Costs of the neutral member and incidental expenses are to be shared by the parties, unless they agree upon different arrangements (J.A. 21-27). All trainmen, brakemen and helpers, except those on furlough when the Award becomes effective, are to retain their rights to employment until removed from the carrier's employee lists through natural causes (J.A. 19-20).[1]

3. *Proceedings in the courts below.* In accordance with the statute, the Board filed its Award in the

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[1] Secs. 4 and 5, Pet. App. 28a-29a.

United States District Court for the District of Columbia. Petitioners, who are three of the five labor organizations involved, filed one petition to impeach the Award, and a fourth labor organization [9] filed another. The fifth labor organization [10] did not challenge the Award. The carriers, the members of the Board, and the Attorney General were named as defendants, and the United States intervened as a defendant. The plaintiffs challenged the Award on numerous grounds, including the claim that Public Law 88-108 is unconstitutional, and the petitioners requested that a three-judge court be convened.

The district court refused to convene a three-judge court, and upheld the Award. The court ruled that three judges were not required because in substance the action was not to enjoin the enforcement of the statute, but to impeach and set aside the Award; and that the request for an injunction was therefore surplusage (Pet. App. 20a-21a). The court further denied the request for a three-judge court, on the ground that the constitutional issues which petitioners raised were insubstantial (J.A. 23a-25a).

On the merits the court held that Congress had authority to provide for an Arbitration Board to make a binding resolution of the dispute; and that since Public Law 88-108 set forth intelligible standards to guide the Board in making its determinations, there was no unconstitutional delegation of authority

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[9] Brotherhood of Locomotive Engineers.

[10] Order of Railway Conductors and Brakemen.

(Pet. App. 23a-25a). The court further held that the Board had complied with the statutory standards in reaching its decision, including the requirements that the Board incorporate the matters on which it found the parties were in agreement and that it gave due consideration to their tentative agreements (Pet. App. 16a-20a); and that its findings were supported by substantial evidence (Pet. App. 15a-18a).

The court of appeals (Judge Wright dissenting in part) affirmed on the basis of the district court's opinion (Pet. App. 1a-2a). All members of the panel agreed that the Award satisfied the standards of Public Law 88-108. The division in the court was over whether a three-judge court was required. The majority noted that, in addition to the reasons given by the district court, an injunction was unnecessary because there was no possibility of enforcement of the Award until after the courts had reviewed it (Pet. App. 2a).

Judge Wright's partial dissent rested on his view that under the judicial review procedure of Section 9 of the Railway Labor Act, which Public Law 88-108 expressly made applicable to the Award, questions as to the constitutionality of Public Law 88-108 could not be raised; and that the constitutional issues, which he did not identify or analyze, are "substantial" (Pet. App. 2a-4a).

In accordance with the judgment of the court of appeals (Pet. App. 4a-5a), judgment on the Award was entered in the district court pursuant to Section

9, Sixth, of the Railway Labor Act (45 U.S.C. 159, Sixth, Pet. App. 32a).[17]

ARGUMENT

We do not minimize the seriousness of the nationwide labor dispute underlying this litigation, nor would we question the importance or widespread impact of the arbitration Award. The questions of law, however, have been thoroughly reviewed and decided by two courts below, and they are not of a caliber justifying further review by this Court. Petitioners present no unsettled question concerning the need for a three-judge district court, and no substantial constitutional question. The statute providing for the arbitration has no general application and only limited prospective force; it provides merely for an Award upon two specific issues binding for two years. The concurrent decisions below are clearly correct.

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[17] The Award is presently in effect, except in regard to employees represented by petitioner, the Brotherhood of Locomotive Firemen and Enginemen. We are advised that that organization and the carriers entered into a stipulation under which the petitioner agreed to file its petition for certiorari by March 20, 1961, without seeking any stay in this Court, and to extend the effective period of the Award if it is held valid; and the carriers agreed not to implement the provisions of the Award, except those concerning the service of lists designating the crews in which the fireman was unnecessary, until 10 days after this Court's action upon the petition. A similar stipulation was entered into in the court of appeals between the two labor organizations representing firemen, and the carriers.

Except for the Award and its enforcement, Public Law 88-108 expired on February 25, 1961.

Further litigation would contribute nothing to the long-range settlement of labor disputes between the railroads and their operating employees. Consequently, there is no occasion for this Court's intervention.

1. Petitioners ask the Court to exercise its "supervisory jurisdiction" to determine whether this case should have been heard and decided by a three-judge district court (Pet. 15-20). The refusal of the courts below to convene a three-judge court was justified not only because of the insubstantiality of petitioners' constitutional challenge (*infra*, pp. 19-24), but also because the constitutional challenge arose in a context wherein the injunctive relief that is the predicate of the applicability of 28 U.S.C. 2282 was plainly unnecessary.

Decisions of this Court have established that when the constitutionality of a federal statute is questioned in a suit for review of an administrative decision which may be set aside without resort to an injunction against the operation of a regulatory program, a three-judge court need not be convened to pass upon the constitutional question. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152-155; *Thompson* v. *Whitaker*, 365 U.S. 465, dismissing appeal from 185 F. Supp. 306 (D.D.C.); *Flemming* v. *Nestor*, 363 U.S. 603, 605-608. As the courts below correctly held (Pet. App. 2a, 20a-21a), this is just such a case.

Congress provided in Section 4 of Public Law 85-108 that the Award would be subject to Section 9 of the Railway Labor Act (45 U.S.C. 159), which sets up a comprehensive and exclusive scheme of judicial review for railway labor arbitration Awards. Pe-

titioners, invoking that procedure, sought to impeach the Award on a number of statutory and constitutional grounds. Any judgment setting the Award aside on constitutional grounds would have nullified it, leaving nothing to be enjoined. There being nothing to enjoin, the convening of a three-judge court was not required. In short, the statutory procedure for judicial review of the Award rendered unnecessary the issuance of any injunction against the enforcement of either the Award itself or the underlying statute upon which it was based.

In these circumstances, it is irrelevant that petitioner's complaint sought (J.A. 271 J and 271 K), in addition to a judgment declaring that the statute and Award based thereon were unconstitutional, an injunction restraining the railroads from putting the Award into effect (Pet. 15-20). For where, as here, a single judge operating under a prescribed statutory review procedure can provide full relief against the operation of an unconstitutional statute by setting aside an order of an administrative body, a three-judge court need not be convened even though the

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In their motions to recall and stay the mandate of the court of appeals, petitioners themselves urged that the Award was not self executing and could not go into effect until after judgment was entered upon it. Moreover, apart from the question whether the Award was self-executing, it is clear that Congress set the time limits on the filing and effectiveness of the Award so that the courts would have an opportunity under the procedures of Section 9 to pass on its validity before it could go into effect. 109 Cong. Rec. (Aug. 26, 1963), pp. 15060-15061, and 109 Cong. Rec. (Aug. 27, 1963), pp. 15111 and 15112.

plaintiff also seeks an injunction against enforcement of the statute. *Flemming* v. *Nestor*, 363 U.S. 603; see, also, *Thompson* v. *Whittier*, 365 U.S. 465; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154.

Judge Wright in dissent concluded that the arbitration Award could not be impeached on constitutional grounds in a Section 9 proceeding, and therefore believed that a single judge could not grant full relief (Pet. App. 3a). Under his view, two separate actions apparently were necessary to challenge this Award: *first*, an action before a single judge under Section 9, with appeal to the court of appeals, to determine all statutory challenges to the Award and all questions of

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Petitioners state that the plaintiff in *Thompson* v. *Whittier*, 365 U.S. 465, "sought not an injunction but the setting aside of a ruling" (Pet. 17). That statement is erroneous, as we advised the court of appeals. See Brief for Appellees the United States, et al., in C.A.D.C. Nos. 18331-18334, p. 62. Plaintiff in that case "sought to enjoin the enforcement and execution of the Statute" he challenged. Jurisdictional Statement in *Thompson* v. *Whittier*, No. 500, O.T. 1960, p. 8; Motion to Dismiss, pp. 5-6; *Thompson* v. *Gleason*, 317 F. 2d 901, 903 (C.A.D.C.), on appeal from *Thompson* v. *Whittier*, *supra*, 185 F. Supp. 306 (D.D.C.). Similarly, in *Flemming* v. *Nestor*, *supra*, the plaintiff sought an affirmative order in the nature of an injunction. Record, No. 51, O.T. 1959, p. 2; Brief for Appellant, pp. 25-26.

Petitioners' reliance upon *Coffman* v. *Breeze Corporations*, 323 U.S. 316, *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. 73, and *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, is misplaced. Since none of these cases involved suits to set aside or review an administrative decision, they do not derogate from the principle that a three-judge court need not be convened when a constitutional issue is raised in such a suit.

statutory interpretation; and, *second*, a separate proceeding before a three-judge district court, with direct appeal to this Court, to determine the constitutionality of Public Law 88-108.

Congress could not have intended to and did not provide such an anomalous and unmanageable procedure. The Section 9 proceeding was intended to be the exclusive method for judicial review of the Arbitration Board's decision,[21] and constitutional issues could be raised in that proceeding.[22] Where Congress

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[21] Sections 3 and 4 of Public Law 88-108 provided that, except for being subject to Section 9, the "award shall be binding" on the parties and "shall constitute a complete and final disposition" of the issues. Pet. App. 28a-29a. Section 9 itself provides that, unless an Award is challenged thereunder within 10 days after its filing, "the court shall enter judgment on the award, which judgment shall be final and conclusive." Section 9, Second, 45 U.S.C. 159 Second, Pet. App. 30a.

[22] Unless Congress specifies otherwise, the courts are presumed to have jurisdiction to determine constitutional issues. *E.g., Greene* v. *McElroy*, 360 U.S. 474; *Estep* v. *United States*, 327 U.S. 114, 120-123 and cases cited. For example, there was no express provision for judicial review for constitutional issues or questions of law in Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), but this Court held that constitutional issues could and must be raised in that proceeding, and that a three-judge court was therefore unnecessary. *Flemming* v. *Nestor*, *supra*. Moreover, the language of Section 9, permitting the setting aside of the Award if it did "not conform, nor confine itself to the stipulations of the agreement to arbitrate" implies that the constitutionality of Public Law 88-108 could be challenged in the Section 9 proceeding, because, as all parties below agreed, that statute was the "agreement to arbitrate." If there were no constitutional statute, there would have been no valid agreement to arbitrate, and the Award would be invalid.

prescribes the method for judicial review, all issues, including constitutional questions, must be litigated there.[23]

Nor is there any merit to Judge Wright's belief that Section 9 forecloses review by this Court (Pet. App. 4a) and his consequent inference that constitutional issues must be raised by some other avenue (Pet. App. 4a). As petitioners demonstrate, this Court has jurisdiction under 28 U.S.C. 1254 to review all issues in a Section 9 proceeding (Pet. 28-29). Judge Wright was also concerned that the Section 9 proceeding would not afford petitioners adequate relief, because it would not prevent the enforcement of Section 1 of Public Law 88-108, which forbade for 180 days any change in the work rules and any strikes or lockouts (Pet. App. 3a). The short answer is that the petitioners never sought an injunction against the operation of Section 1.[24]

2. The insubstantiality of petitioners' constitutional challenge to Public Law 88-108 (Pet. App. 2a, 25a) provides an alternative basis for the refusal of the courts below to convene a three-judge district court

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[23] *E.g., Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767, 772-773.

[24] Petitioners challenged only the features of Public Law 88-108 pertaining to the rendering of the Award, and requested only that the railroads "be permanently enjoined from *putting said award* in effect" (J.A. 271 J and 271 K; emphasis added). They did not challenge the constitutionality of Section 1; and any constitutional challenge to that Section would have been plainly insubstantial. *Wilson v. New*, 243 U.S. 332; *California Water Service Co. v. City of Redding*, 304 U.S. 252; *Jamison & Co. v. Morgenthau*, 307 U.S. 171.

and a dispositive answer to petitioners' contention that this case presents an important question of constitutional law (Pet. 20-27).

That Congress has authority to provide for the binding resolution of a labor-management dispute which would otherwise result in a crippling national railroad strike was settled by this Court's decision in *Wilson* v. *New*, 243 U.S. 332, and confirmed by later judicial and statutory developments.[20] In apparent recognition of this settled authority of Congress to fix wages, hours and working conditions in order to prevent such a strike directly, or "by appropriate legislation for compulsory arbitration" (*Wilson* v. *New*, *supra*, 243 U.S. at 351, 359),[21] petitioners expressly conceded

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[20] See, *e.g.*, *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 535-537; and *Brotherhood of Railway Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (sustaining and applying Section 3 of the Railway Labor Act, 45 U.S.C. 153 First (i), which provides for the compulsory arbitration, without strike, of disputes arising over the interpretation of existing collective bargaining agreements.)

[21] Congress unquestionably has authority to curtail an employee's right to strike, especially where the alternative would be a grave threat to health or safety: *United Steelworkers of America* v. *United States*, 361 U.S. 39; *Dorchy* v. *Kansas*, 272 U.S. 306, 311; *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U.S. 287; *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722; *Gibboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490. See also, *Brotherhood of Railway Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30; and *National Labor Relations Board* v. *Radio & Television Broadcast Engineers Union*, 364 U.S. 573.

There is no substance to the contention of the *amicus curiae* (Brief Amicus Curiae in support of petition, pp. 6-18) that there is a constitutionally-protected "liberty of contract" which is here impinged. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525.

in the courts below the authority of Congress to fix the terms and conditions of employment, or to commit that task to another tribunal under adequate standards (Pet. App. 23a; J.A. 333). Nor, apparently, do petitioners now challenge that Congressional power: They contend rather, that Public Law 88-108 constitutes a delegation of legislative power without adequate standards and safeguards (Pet. 22-27).

Public Law 88-108 was enacted for the sole purpose of resolving two narrow, and sharply defined issues[25] concerning the necessary manning of locomotives and trains. By the time of its enactment, the areas of disagreement between the parties had been narrowed, as Congress recognized, primarily by suggestions of the Secretary of Labor and resulting

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[25] Petitioners also contend that they had a constitutional right to have the Arbitration Board make findings of fact, and to judicial review of those findings for substantial evidence. There are no such constitutional requirements. *E.g., Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297; *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 615-616. In any event, the opinions set forth the facts which were found and which formed the basis for the Award (J.A. 30-91). Although the carrier members did not formally concur in the findings, their opinion reflects no disagreement with them, and they did concur in the Award (J.A. 89-91). All parties below, including petitioners, treated the findings of the neutral members as those of the Board. And the courts below ruled that the findings were supported by substantial evidence (Pet. App. 18a, 25a, 2a). Accordingly, the contentions of petitioners are academic.

[26] The issues and jurisdiction of the Board were defined in terms of the carriers' notices of November 2, 1959 and the organizations' notices of September 7, 1960. Sec. 3, Pub. L. 88-108, Pet. App. 28a.

negotiations (Pub. L. 88-108, Clause 6, Pet. App. 26a).

Public Law 88-108 directs the Arbitration Board, in resolving the two issues submitted to it, to incorporate "any matters on which it finds the parties were in agreement," and to give "due consideration to those matters on which the parties were in tentative agreement" and to "the narrowing of the areas of disagreement." Sections 3 and 7(a), Pet. App. 28a, 29a. Thus, Congress directed the Board to preserve any actual agreements it found, and to consider any progress that had been made through collective bargaining. In addition, the statute directs the Board to give "due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected." Sec. 7(a), Pet. App. 29a. In the context of the issues as previously defined by the notices of the parties, and their ensuing negotiations, Public Law 88-108 in effect directs the Board to consider the need for the fireman and train crew positions in the light of safe and adequate transportation service to the public, and to evolve a method for eliminating unnecessary positions in view of the interests of the presently employed employees as well as of the carriers.

Indeed the matters on which the parties had reached tentative agreement and agreement in principle were broad enough to provide the foundation for the Board's resolution of the entire train crew ("crew consist") issue, and the individual job security aspect of the firemen issue (see, *supra*, pp. 9-11).

That these provisions set forth ascertainable, intelligible policy directions and standards for decision, and that there has been no unconstitutional delegation of legislative power, seem scarcely open to dispute.[30] *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 104-106; *Lichter* v. *United States*, 334 U.S. 742, 785. This Court has repeatedly sustained the constitutionality of statutes setting forth guidelines and standards much less instructive than those of Pub. L. 88-108.[31]

The only authorities relied upon by petitioners are three state court cases which involved statutes or ordinances for compulsory arbitration in which there were no standards whatsoever to guide the Arbitration Board (Pet. 23-24).[32] Similarly, the only two cases in which this Court has ever held acts of Congress to be unconstitutional delegations of legislative authority involved statutes which contained no standards whatever for determining under what circumstances, and how, such authority was to be exercised.[33]

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[30] There is, accordingly, no substance to petitioners' contention (Pet. 22) that the statute gave "uncontrolled discretion" to the Arbitration Board.

[31] See the opinion of the district court, Pet. App. 24a-25a, for a few examples.

[32] State statutes prescribing some standards for decision by the arbitration tribunal have been sustained against contentions of unconstitutional delegation. *E.g.*, *N.J. Bell Tel. Co.* v. *Communications Workers*, 5 N.J. 354, 75 A. 2d 720.

[33] *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, and *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495. In his concurring opinion in the latter case, Mr. Justice Cardozo described

Whatever their present vitality,[30] they were wholly inapplicable here.

3. The Arbitration Board limited its Award to the two issues submitted for arbitration, incorporated the matters in which it found the parties were in agreement, and gave careful consideration to the matters on which the parties were in tentative agreement, and scrupulously followed the other mandates of Public Law 88-108, as a reading of its opinion (J.A. 39-88) discloses, and as all of the judges below agreed (Pet. 2a, 11a-20a). Since the courts below were clearly correct in rejecting petitioners' statutory attack upon the Board's Award, and Public Law 88-108 has no application to disputes other than those resolved by the Award, the statutory issues presented in this case do not warrant further review by this Court.

4. Congress adopted Public Law 88-108 to resolve a particular labor-management dispute by providing for a speedy, binding resolution of the two key issues underlying it (Public Law 88-108, Clauses 1-7, Pet. App. 26a-27a). The statute itself has already expired, except for the Award, which has a two year life (Sections 4 and 8, Pet. App. 29a, 30a). In adopting the legislation Congress specifically acted upon the agreement in principle of both parties to submit to bind-

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the legislation as a "roving commission" to the Executive, to "inquire into evils and then, upon discovering them, do anything he pleases." 295 U.S. at 551.

[30] See *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 399; *Parker* v. *Brown*, 317 U.S. 341, 352.

ing arbitration, and other circumstances peculiar to this case, and expressly restricted the scope of the statute so as not to set a precedent for governmental intervention in other labor-management disputes.[36] The narrow scope of this legislation—providing for binding arbitration of two issues in a particular dispute for a limited period—indicates that the case is not of sufficient general importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[36] H. Rep. No. 713, 88th Cong., 1st Sess., p. 13:

> The committee believes that this legislation should not be considered as a precedent for congressional intervention in other labor-management disputes. This dispute is highly unusual, and the solution established by the legislation is, insofar as arbitration is concerned, a solution already agreed to in principle by the parties themselves.

Accord: S. Rep. 459, 88th Cong., 1st Sess., pp. 7-9.

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